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Supreme Court, U.S.
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No. 95-343 AUG 21 1995

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THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

BULLIS vs. FROEHLICH, et al.

Certiorari to the Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Lawrence A. Bullis
Petitioner, pro per
2308 West Whitton Avenue
Phoenix, Arizona 85015
(602) 230-1971

46 pp

QUESTIONS PRESENTED FOR REVIEW

Where a State has granted a property interest in public employment and established an administrative body with exclusive original jurisdiction to determine whether actions taken against an employee are justified, is an employee's right to Due Process violated when the state deprives the employee of his property interest because of "potential misconduct," withholds its reasons for doing so for five years, and raises its allegations for the first time in a forum other than the one specified by law?

NAMES OF PARTIES

Petitioner (Plaintiff below)

Lawrence A. Bullis

Respondents (Defendants below)

Ben Froehlich and Judy Froehlich, husband and wife;

Thomas Stickney and Janet Stickney, husband and wife;

Thomas Young and Mary Young, husband and wife;

Ronald Greenhalgh and Trelva Greenhalgh, husband and wife;

Gerald Rinehart; and

The State of Arizona

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OPINIONS OF OTHER COURTS AND ADMINISTRATIVE AGENCIES

Division Two of the Arizona Court of Appeals issued a memorandum decision in this matter on September 20, 1994, as number 2 CA-CV 94-0242. The text of that decision is found in the Appendix.

JURISDICTION

This civil action was originally filed by Petitioner Lawrence A. Bullis in May, 1988, in the Superior Court of the State of Arizona in and for the County of Maricopa as cause number CV88-13848. Judgment on directed verdict was entered for defendants on all claims on or about January 11, 1994, in the Superior Court . Petitioner's Motion for New Trial was denied on March 18, 1994.

Petitioner appealed to the Arizona Court of Appeals and was assigned docket number 2 CA-CV 94-0242. Judgment was affirmed by the Arizona Court of Appeals on September 20, 1994.

Petitioner sought review by the Arizona Supreme Court under docket number CV 94-0512-PR. Review was denied by the Arizona Supreme Court on May 26, 1995.

No petitions for rehearing have been filed or are now pending.

The United States Supreme Court has jurisdiction over this matter pursuant to 28 USC 1257, as this petition follows the denial of review of this matter by the highest court in the state of Arizona and involves a right conferred by the United States Constitution.

This Petition is filed within the ninety-day time limit set forth in Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS and STATE STATUTES INVOLVED

Fifth Amendment, U.S. Const.:

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, U.S. Const.:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws.

Arizona Revised Statues:

38-531, 38-532, 41-770, 41-783, and 41-785. All of the foregoing are set forth in the Appendix.

Arizona Administrative Code:

Rules R2-5-901, R2-5-803, and R6-3-51135. All of the foregoing are set forth in the Appendix.

STATEMENT OF THE CASE

1. Petitioner Lawrence A. Bullis (Bullis hereinafter) was employed by the State of Arizona beginning on June 11, 1984, as an EDP Programmer/ Analyst with the state's payroll system. (Reporter's Transcript, Aug. 3, 1993, at 43-44.)

2. Bullis had permanent status as of January 11, 1985, (Trial Exhibit 89).

3. On April 6, 1988, Bullis reported by letter to the Arizona Attorney General that one of his managers, now-Respondent Thomas Young (Young) had assigned a state employee to perform work for a private organization at public expense. (RT Aug. 3 at 102-107, Exh. 110).

4. On or about May 26, 1988, Bullis filed the original complaint in this matter in the Superior Court of the State of Arizona naming as Defendants Respondents Gerald Rinehart (Rinehart), Young, and Ben Froehlich (Froehlich). The summonses and complaints were served on the defendants on June 3 through June 6, 1988.

5. On June 14, 1988, Rinehart informed Bullis that Bullis had been reassigned to a different job. The only reason given for Bullis' reassignment was manpower requirements. (RT Aug. 4 at 18-19; Exh. 29).

6. Also on June 14, 1988, Young and Rinehart presented Bullis with a memo inquiring about certain computer programs. (RT Aug. 4 at 19-20; Exh. 138).

7. John King, Bullis' supervisor, said the job to which Bullis was reassigned differed significantly in that it involved no programming at all and was "not entirely" consistent with Bullis job title. Bullis' new

office was used as a storeroom and lacked, desk, chair, computer, and telephone. (RT Aug. 10 at 24-25.)

8. On June 16, 1988, Bullis tendered a resignation effective July 5, 1988. (Exhibit 32.) Bullis testified that he did so because of the inconsistency between his old job and the new one. (RT Aug. 5 at 64.)

9. On June 20, 1988, Respondent Thomas Stickney (Stickney) placed Bullis on paid administrative leave "pending investigation" and had Bullis escorted from his office by police officers. (RT Aug. 4 at 20-23, Aug. 5 at 140, Aug. 9 at 4; Exh. 140).

10. Bullis was never permitted to return to work with the State and paid administrative leave was discontinued after July 5, 1988. (RT Aug. 4 at 23.)

11. On July 5, 1988, King sent Bullis a letter accepting his resignation. (RT Aug. 10 at 35, Exh. 39)

12. On December 22, 1988, the Arizona Department of Economic Security determined that Bullis had been discharged from employment and that his resignation had been rejected. (Exhibit S, Appendix to Plaintiff's First Motion for Summary Judgment, July 7, 1992.)

13. On January 15, 1991, Rinehart testified that the reason why Bullis was transferred was because he had filed suit against his bosses, including Rinehart. (Exhibit O, Appendix to Plaintiff's First Motion for Summary Judgment, July 7, 1992.)

14. On July 16, 1992, Rinehart filed an affidavit in this matter with the Superior Court alleging that Bullis had been reassigned in 1988 because of misconduct.

15. At trial in August, 1993, Stickney testified that he was the person who was ultimately responsible for reassigning Bullis. (RT Aug. 5 at 96.)

16. Stickney testified that he suspected Bullis of having written a computer program to print a list of single women and another to steal money from judges on the state payroll system. (RT Aug. 5 at 115-116.)

17. Stickney testified that Bullis was a "risk" to leave on the job both because of his suspicions about Bullis and because of what he called "irrational responses to more or less normal everyday activities" that was "part of a pattern" (RT Aug. 5 at 95).

18. The only "irrational" acts Stickney could cite were Bullis' complaints to law enforcement officials. (RT Aug. 9 at 25.)

19. Stickney did not consider placing Bullis on administrative leave in lieu of reassigning him. (RT Aug. 5 at 96.)

20. Stickney intended to remove Bullis permanently "for the morale of the organization" by placing him on administrative leave on June 20, 1988. (RT Aug. 5 at 105-106.)

21. Stickney admitted that Bullis had been given no notice of the allegations made against him. (RT Aug. 5 at 95-96.)

22. Stickney said he did not give Bullis notice of the charges against him (RT Aug. 5 at 95-96) and that he did not feel it was "wise" to inform Bullis (RT Aug. 5 at 109).

23. Stickney testified that he "would be reluctant" to re-hire Bullis. (RT Aug. 9 at 22.)

WHEN ISSUES WERE RAISED

In the Trial Court.

The Due Process issue was first raised in Bullis' *Amended Civil Complaint*, paragraphs LIX through LXIII, filed on June 19, 1989. Summary judgment on this claim was granted to defendants by minute entry on October 13, 1992.

Bullis also raised the issue in each of the following motions:

Plaintiff's Motion to Estop Unlawful Defense, filed August 7, 1992. Motion denied by minute entry dated September 18, 1992.

Plaintiff's First Motion for Summary Judgment, filed July 7, 1992. Motion denied by minute entry dated October 13, 1992.

Plaintiff's First Motion In Limine, filed October 13, 1992. Motion denied by minute entry dated November 19, 1992.

Plaintiff's Second Motion In Limine, filed June 9, 1993, and *Plaintiff's Reply Re: Plaintiff's Second Motion In Limine*, filed June 29, 1993,. Motion denied by minute entry dated July 2, 1993.

Plaintiff's Fifth Motion In Limine, filed July 23, 1993. Motion denied by minute entry dated July 30, 1993.

Plaintiff's Requested Jury Instructions, numbers 22 and 33, filed July 26, 1993. Not given due to directed verdict for defendants on August 10, 1993.

In the Arizona Appellate Courts.

Prior to trial, Bullis petitioned for a Writ of Prohibition via Special Action from the Arizona Court of Appeals as cause number 1 CA-SA 93-0091. The issues raised therein included those raised here. The Arizona Court of Appeals declined to accept jurisdiction on April 20, 1993.

Bullis raised his Due Process arguments on pages 20 through 27 of his Appellant's Opening Brief, filed May 20, 1994. The Arizona Court of Appeals affirmed the trial court's judgment on all counts on September 20, 1994. See Appendix A for text.

Bullis petitioned for Review by the Arizona Supreme Court on October 20, 1994. Bullis again raised the Due Process issue on pages 10 through 13 of the Petition for Review. Review was denied without comment on May 26, 1995.

ARGUMENT

Introduction

This Court has previously held that a public employee with permanent status has a property interest in his employment of which he cannot be deprived without Due Process, consisting of notice and an opportunity to respond *before* the action is taken followed by a formal hearing at a meaningful time. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 494 (1985).

In this matter, Petitioner Bullis alleges that he was deprived of the property interest in his public employment, first when he was reassigned from the position he held with the State of Arizona in violation of that state's Whistleblower Statutes, and second when he was terminated from the job to which he had been reassigned. Bullis filed suit in the state courts, as expressly permitted by the Statutes. When the case went to trial five years later, the defendants admitted reassigning Bullis because of his whistleblowing, but they also alleged for the first time that Bullis was suspected of numerous acts of misconduct that justified their actions.

Bullis sought to have all testimony regarding the alleged misconduct excluded from the trial arguing that the testimony violated his right to due process on three separate grounds: 1) The state's five year delay in raising allegations against Bullis violated the Due Process provision of a hearing at a meaningful time; 2) By statute the State Personnel Board -- not the court -- had exclusive original jurisdiction over the subject matter; and 3) That the defendants deprived Bullis of an opportunity to defend himself by inducing Bullis to believe that there were no charges against him.

The trial court permitted testimony about Bullis' alleged misconduct and granted a directed verdict in favor of the defendants. The Arizona Court of Appeals held that the defendants' concerns justified their actions against Bullis and declined to rule on the merits of Bullis' Due Process arguments. That Court found it permissible for the defendants to "use evidence of plaintiff's **potential misconduct** to explain the actions they took." See Appendix A.

The decisions reached by the state courts in Arizona nullify this Court's ruling in *Loudermill* by, in effect, holding that the State may take an adverse action against an employee because of what the employee *might* do, withhold its reasons for doing so, wait for the employee to sue, and then raise its allegations for the first time years later in a forum other than the one specified by state law.

Review should therefore be granted because of the obvious conflict between this Court's previous decision in *Loudermill* and the Arizona Court of Appeals' decision in this matter.

Bullis was entitled to notice and opportunity before being reassigned on June 14, 1988.

A state may choose when and whether to vest a property interest in public employment, but those property interests may not be deprived without Due Process. *Loudermill*, 470 U.S. at 541.

ARS 38-531 *et seq.* , the Arizona Whistleblower statutes, prohibit a wide range of punitive actions from being taken against a state employee who has reported a violation of law or gross mismanagement. Among the actions prohibited are reassignment and transfer, as well as termination.

The State of Arizona exercised its discretion to vest a property interest not only in its state employment, but to create a property interest in a specific position under the circumstances set forth in ARS 38-532(B).

Because Bullis filed a complaint with the Arizona Attorney General in April, 1988, [Fact 3] he acquired a property right in the position he then held pursuant to ARS 38-531 *et seq.* Bullis could not be deprived of his property interest in the position he then held except for a cause set forth in ARS 41-770. See ARS 38-532(F). Bullis could not lawfully be discharged, transferred, or reassigned due to his complaint.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Loudermill*, 470 U.S. at 538. Bullis was entitled by the Arizona Whistleblower Statutes to retain his position. Therefore, Bullis had a property interest in the position he then held and he could not be removed from that position except for cause.

But Bullis was reassigned on June 14, 1988 [Fact 5]. At trial Stickney testified that he was ultimately responsible for the decision to reassign Bullis [Fact 15]. He said he did so because he thought Bullis to be "irrational" for complaining about "very petty matters, which were part of our, you know, our normal everyday activity" [Fact 17] such as drug dealing and misuse of state funds [Fact 18]. Stickney clearly violated the Whistleblower statute in reassigning Bullis because of his complaint to the Attorney General.

But Stickney cited a second reason for reassigning Bullis. He claimed that he suspected

Bullis of misconduct and that he removed Bullis from his position because of those suspicions [Facts 16, 17]. Stickney admitted that he had not given Bullis notice of the charges against him and that he had deliberately withheld his reasons from Bullis [Fact 22]. (Whether Stickney really suspected Bullis of misconduct back in 1988 or whether he and his co-defendants fabricated the story at a later date is not relevant to these Due Process arguments, although the eleventh-hour nature of the charges is suspicious.)

The Affidavit of Gerald Rinehart filed with the trial court on July 16, 1992, describes a Star Chamber-like proceeding in which everyone with an ax to grind against Bullis sat as their own jury, determined that Bullis was guilty of misconduct, and that he had to be removed from his job. Bullis, of course, was not invited to this secret ceremony, held on Sunday, June 12, 1988, when state offices are generally closed.

This Court has previously held that "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546.

"The essential requirements of due process are . . . notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Loudermill*, 470 U.S. at 546.

The Defendants in the past have tried to paint the questions posed to Bullis on June 14, 1988, [Fact 6] as the "notice" required by Due Process. No reasonable reading of this document [Trial Exhibit 138], however, supports that argument. There is no

charge of misconduct leveled in the document and no reference to any cause set forth in ARS 41-770. Besides, Stickney admitted that Bullis had been given no notice of the charges and that he deliberately withheld notice from Bullis [Fact 22].

In *Loudermill*, this Court also ruled that "where the employer perceives a significant hazard in keeping the employee on the job" that it is proper to suspend the employee with pay pending a hearing. 470 U.S. at 544-5. Stickney claimed that he perceived Bullis to be a risk in keeping him on the job [Fact 17], but he did not consider placing Bullis on administrative leave instead of reassigning him [Fact 19].

Because the defendants were limited to taking action against Bullis to a cause set forth in ARS 41-770, they were required to give Bullis notice and opportunity to respond before reassigning him for cause. They did not do so.

The fact that Arizona has not adopted a specific procedure for giving an employee with property rights acquired through whistleblowing notice and an opportunity to respond before taking away his property does not relieve the defendants of their duty to extend Due Process to Bullis. As this Court noted in *Loudermill*, the proceeding need not be formal or elaborate if the employee is entitled to a subsequent formal hearing. 470 U.S. at 545.

Bullis was discharged without Due Process on June 20, 1988.

The new job to which Bullis had been reassigned was unlike the one which Bullis had agreed to perform for the state. Bullis' new supervisor testified that it was "not entirely" consistent with Bullis'

job title of Programmer/Analyst and that the job involved no programming at all [Fact 7]. Additionally, Bullis' new office had neither desk, chair, computer, or telephone and was used as a storeroom [Fact 7]. One working day after being reassigned, Bullis submitted a letter of resignation effective July 5, 1988, because of the job conditions [Fact 8].

Among the State Personnel Rules, adopted pursuant to ARS 41-783, is Rule R2-5-901(c), which permits an agency head to refuse an employee's resignation and to terminate employment under rule R2-5-803, which sets forth pre-dismissal and dismissal procedures.

Bullis' resignation was not accepted. Stickney testified that he wanted to remove Bullis "for the morale of the organization." [Fact 20] Stickney claimed that Bullis was a risk to keep on the job [Fact 17]. At Noon on June 20, Stickney hand-delivered to Bullis a letter placing Bullis on paid administrative leave "pending investigation." Bullis was then escorted from his workplace by an armed police officer [Fact 9]. Stickney's actions and statements, along with his subsequent allegations against Bullis, are not consistent with accepting Bullis' resignation; they are all consistent with rejecting Bullis' resignation and removing Bullis for cause.

Applying Arizona's only authority for determining whether Bullis was terminated, Rule R6-3-51135, AAC, the Appeals Board of the Arizona Department of Economic Security determined that Bullis had been discharged for reasons other than misconduct connected with his work because he was discharged from his job more than fourteen days before his resignation was to be effective. Fact 12; also see Appendix C.

Under Arizona law, resignation is not a bar to a claim of wrongful discharge. A state agency cannot lawfully coerce a resignation by reassigning an employee. *Lewis vs. Jamieson,* 135 Ariz. 322, 660 P.2d 1249 (Ariz.App.1983). A constructive discharge occurs when "working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Civil Rights Division v. Vernick,* 132 Ariz. at 85. "The mere fact that an employee quits is not dispositive. It must be determined whether he did so voluntarily. An involuntary quitting or forced resignation is equal to a discharge." *Pettypool v. Ariz. Dept. of Economic Security*, 161 Ariz. at 171. This was, of course, a question of fact for the jury; no determination was made because the trial court directed a verdict for the Defendants.

ARS 41-785(A) requires that an employee who is to be terminated for cause be notified in writing of the specific charges against him when the action is taken. Personnel Rule R2-5-803(B) requires that the employee also be notified of his right to appeal his termination to the Personnel Board.

Bullis was also entitled to Due Process because of the nature of the charges against him. Where the State accuses an employee of acts which impeach his good name, honor, reputation, or integrity and this "governmental defamation is tied to an alteration of his status," the employee is entitled to a hearing, even if the state does not publicly announce these allegations. *Montoya v. [Arizona] Law Enforcement Merit System Council,* 148 Ariz. at 110.

This court has also recognized that a person whose reputation has been defamed by the government and who loses his government employment or is denied future employment has a

claim for a due process violation. *Paul v. Davis*, 96 S.Ct. at 1164. Not only did Bullis lose his state job due to the allegations raised against him, but Stickney also testified that he "would be reluctant" to rehire Bullis [Fact 23]. Bullis lost his former employment because allegations made secretly about him, and he is to be denied future employment with the state, as well.

Defendants waited too long to raise allegations against Bullis.

"The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546.

"The Due Process Clause requires provision of a hearing 'at a meaningful time.' At some point, a delay in the post-termination hearing would become a constitutional violation." *Loudermill*, 470 U.S. at 547 [citation omitted]. Arizona has already established that a three-and-one-half year delay in bringing charges against an employee violates his constitutional right to Due Process. *Zavala vs. Ariz. State Personnel Bd.*, 159 Ariz. at 264.

Defendants took actions against Bullis in June, 1988 [Facts 5, 9]. They waited until July, 1992, to inform Bullis of some charges against him and waited until trial in August, 1993, to unload the rest of their allegations.

In this case, notice was given long after the constitutionally meaningful time had passed and, apparently, only because Bullis sought redress of his grievances. Had Bullis not pursued this action, he

never would have been given notice of the charges made against him.

The entire purpose of Bullis' lawsuit was to determine whether he would be reinstated to the position from which he had been reassigned on June 14, 1988; that is, to determine whether to restore Bullis' property interest in his employment. If the State of Arizona had cause to deprive Bullis of his property interest, the time for giving notice and a formal hearing had expired long before the August, 1993, trial date.

The burden to provide notice was on the Defendants. By their own admission, they gave no notice [Fact 21] and they deliberately withheld notice at the time notice was due [Fact 22].

The delay prejudiced Bullis. By 1993, Bullis' immediate supervisor, whose testimony would have supported Bullis, had moved out of state and could not be located. The former acting Director of Bullis' department, with whom Bullis had discussed his Whistleblower complaints, also could not be located. In addition, the State had destroyed numerous documents during that five-year period that would have aided Bullis.

Because Bullis was entitled to a Due Process notice of the charges against him and a hearing at a meaningful time, it was an error for the trial court to have allowed the Defendants to level charges against Bullis for the first time five years after the fact.

Defendants raised their allegations against Bullis in the wrong forum.

Arizona Revised Statutes (ARS) 41-781 *et seq.* create a State Personnel Board. ARS 41-770 sets

forth the only grounds for terminating *or disciplining* state employees.

ARS 41-785 places sole original jurisdiction to hear complaints against state employees with the State Personnel Board. "It is clear, both by statute and regulation, that the Personnel Board is the final fact finder . . ." *Evans v. State ex rel. Ariz. Corporation Comm.*, 131 Ariz. at 572.

ARS 41-785 permits the Arizona Superior Court to review decisions of the Personnel Board on appeal. The Superior Court is limited to appellate review of the Board's actions and may not impose its own judgment. "The superior court is not to weigh the evidence." *Evans v. State ex rel. Ariz. Corporation Comm.*, 131 Ariz. at 573.

While the state is limited to bringing its charges against an employee to the State Personnel Board, the Whistleblower Statutes allow an employee to file a complaint against his employer either in the courts (ARS 38-532(K)) or with the appropriate administrative board (ARS 38-532(H)). Nothing in the Whistleblower Statutes transfer original jurisdiction over a complaint against an employee to the court. ARS 38-532(L). The state is always required to give notice and opportunity to respond before acting against the employee.

In a similar dispute over original jurisdiction the Nevada Supreme Court ruled that the district court cannot sustain the discharge of a state employee for reasons which were never asserted against him in a hearing before the State Personnel Advisory Commission. The Court found "it clear that the [district] court lacked such authority." *Schall v. The State of Nevada ex rel. Dept. of Human Resources*, 587 P.2d at 1311-2.

The Constitution guarantees not just Due Process, but Due Process of Law. Bullis had a right to a hearing before the State Personnel Board, as provided for by state statute. He did not get it. Since the Superior Court was barred by law from hearing an original complaint against a state employee, Bullis' right to Due Process was violated as the process applied was not the process specified by state law.

Defendants deprived Bullis of opportunity to defend himself by inducing him to believe that there were no charges against him.

The defendants had numerous opportunities both before and after terminating Bullis' employment to raise their allegations against him. On each and every occasion for over four years, the defendants remained silent. A reasonable person would **not** interpret the silence as notice.

It began on June 14, 1988. The written order given by Rinehart at the time of Bullis' reassignment [Fact 5] alleged that the reason was staffing requirements. There was no mention of alleged misconduct.

The silence was continued on June 20, 1988, when Bullis was permanently removed from his job [Fact 9]. Stickney gave no notice, by his own admission [Fact 21]. Bullis had no reason to believe that his removal from the workplace was for an alleged good cause.

Then the defendants sent Bullis a letter of accepting his resignation unconditionally [Fact 11]. State Personnel Rule R2-5-901(c), permits an agency head to refuse an employee's resignation and to proceed with termination under rule R2-5-803, which

sets forth pre-dismissal and dismissal procedures. Once again, Bullis had no reason to believe that his removal was for good cause.

But it does not stop there. Bullis applied for Unemployment Insurance Benefits and his claim was initially denied. On administrative appeal in December, 1988, when the State had the opportunity to present it's alleged claims of misconduct, it remained silent [Fact 12].

Finally, in January, 1991, Rinehart testified as to why Bullis no longer worked for the State. He said Bullis had been transferred because he filed suit against his boss; Rinehart made no mention of Bullis' alleged misconduct [Fact 13].

Bullis could not have known of the allegations against him. He was thus deprived of one of the most basic elements of presenting a defense: the opportunity to gather evidence and witnesses in his behalf.

Since Bullis had been induced to believe that there were no charges of misconduct against him until four years had passed, by the time he did receive notice there was no evidence left to gather. Memories had faded, documents were destroyed, and witnesses had left town. Had Bullis been given timely notice, he would have had the opportunity to gather evidence when it was available.

This matter is similar to *Zavala*, where the state induced an employee to accept suspension as a penalty for misconduct without informing that a second penalty -- termination -- would be assessed because he admitted his guilt. In this case, the Defendants induced Bullis to believe that there were no charges against him until years later. Bullis was deprived not

only of the required notice, but also of the timely opportunity to gather evidence for his defense because the defendants induced him to believe that he had no need to defend himself.

The Arizona Court of Appeals termed the defendants' evidence "uncontradicted." By denying Bullis the opportunity to gather evidence and witnesses in his behalf, how could the defendants' evidence be anything other than uncontradicted?

Since the defendants willfully withheld notice of the charges against Bullis and implied that they had no charges to make against him, it was a violation of Bullis' Due Process rights to permit the defendants to bring charges against Bullis for the first time five years after the fact.

Conclusion

The findings of the trial court and the Arizona Court of Appeals clearly violate Bullis' Due Process rights to notice and an opportunity to respond before he was deprived of his property interests in his employment and his right to a hearing at a reasonable time. Those courts held that the Defendants were justified in reassigning Bullis because they allegedly suspected Bullis of misconduct.

That conclusion is in polar opposition to this Court's findings in *Loudermill.* The Arizona courts' position allows the state to deprive an employee of his property interests for any reason (good or bad) , force the employee to sue in the courts for reinstatement, and then, like a magician pulling a rabbit out of his hat, allow the state to claim for the first time years

afterward and in any forum of its choosing that it *suspected* the employee of misconduct.

Particularly troubling is the Arizona Court of Appeals finding that evidence of "potential misconduct" is not only admissible, but that the state's fear -- real or imagined -- of what an employee may do in the future justifies the grossest of violations of Due Process. This ruling allows public employees to be discharged not for what they have done but for what they might do in the future. The ruling further allows the state to raise it's allegations of "potential misconduct" at any time of the state's choosing. Even if the employee did somehow prove that he was not guilty of misconduct, this ruling would still permit the state to deprive the employee of his property interests by merely asserting that it was concerned about the employee's "potential misconduct."

The Arizona courts' decisions awarding summary judgment to the Defendants on Bullis' claim of Lack of Due Process was clearly not supported by the facts. The facts, admitted by the Defendants themselves, lead to one conclusion only: that Bullis was removed from his job for cause without notice or opportunity to respond before the action was taken and that Bullis was deprived of his right to a hearing at a meaningful time by the Defendants' failure to give Bullis notice of the charges against him for five years.

The Arizona courts also violated Bullis' Due Process rights by permitting the Defendants to raise allegations of misconduct against Bullis for the first time five years after the fact in a forum lacking original jurisdiction over the subject matter and after having implied that they had no cause against Bullis.

For the reasons set forth above, the decision of the Arizona Court of Appeals should be reversed and

this matter remanded for trial or other action consistent with the Due Process Clause. Additionally, this court should prohibit the trial court from permitting the Defendants to enter testimony or other evidence relating to alleged misconduct on the part of Bullis while he was employed by the State of Arizona.

Respectfully Submitted this 21st Day of August, 1995.

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APPENDIX A.

Memorandum Decision of Arizona Court of Appeals

In The Court of Appeals
State of Arizona
Division Two

Bullis v. Froehlich, et al.

2 CA-CV 94-0242

Memorandum Decision

Appeal from the Superior Court of Maricopa County
Cause No. CV88-13848

Plaintiff Lawrence A. Bullis filed a complaint against his employer, the State of Arizona, and a number of supervisory employees. As the case was presented to the jury, the issue was whether Bullis was reassigned from one computer programming job to another in the Department of Administration because he had made allegations of wrongdoing against supervisors and co-employees or because of concerns of misuse by him of computer records within his control. At the close of plaintiff's case, the trial court granted a directed verdict in favor of the defendants. This appeal followed. We affirm.

Over the course of 1987 and the first half of 1988, plaintiff accused many of his supervisors and co-employees of misconduct ranging in seriousness from use of marijuana to using a state employee to type a letter for a civic club. Resulting investigations either did not substantiate misconduct or treated it as less serious than plaintiff believed it to be. During a routine random security audit of programs in employee

computer files in the spring of 1988, it was discovered that plaintiff had in his file a program designed to identify higher paid single female state employees plaintiff's age or younger. He also had a program that appeared capable of removing small amounts of money from the accounts of judicial officers and depositing those amounts to plaintiff's account. Faced with these findings, plaintiff's supervisors assigned him to a different section on June 14, 1988, and asked him to explain how these programs were created. Plaintiff took June 15 off and on June 16 both offered a letter of explanation that did not address those two programs in detail and tendered a letter of resignation.

We believe the trial court correctly granted a directed verdict in favor of the defendants. In the face of uncontradicted direct evidence that plaintiff was transferred because of concerns about computer security generated by the suspicious programs, no reasonable jury could find that the transfer was instead motivated by the allegations of misconduct made by plaintiff over the preceding eighteen months. See *Orme School v. Reeves,* 166 Ariz. 301, 802 P.2d 1000 (1990). The whistleblower statute, A.R.S. 38-532, does not immunize an employee from having his own conduct examined simply because he has charged others with misconduct. Given the nature of the suspect programs, we believe that temporary removal from access was proper. Whether further employment consequences could follow became moot when plaintiff resigned. Having concluded that plaintiff has proved no improper behavior directed at him by any state employee, we need not address further his claims under different theories of breach of covenant of good faith and fair dealing, constructive discharge in violation of public policy, and denial of due process.

We address plaintiff's remaining contentions summarily:

(1) That a motion for dismissal was made on the ground of non-compliance with the claims statute does not preclude a later defense on the ground that the plaintiff voluntarily resigned. There was no evidence of the imposition of intolerable working conditions to force a resignation. *Civil Rights Division v. Vernich Plumbing & Heating Co.*, 132 Ariz. 84, 643 P.2d 1054 (App.1982).

(2) Trial court prejudice was not established by a 1988 comment attributed to but denied by the judge that pro per litigants were often difficult. Nor could the judge be disqualified because he, along with other judges, was a possible victim of a crime contemplated by plaintiff.

(3) While had plaintiff's supervisors sought to discharge him for misconduct, various protections would have been accorded plaintiff, they could not be once plaintiff chose to resign. Defendants could use evidence of plaintiff's potential misconduct to explain the actions they took and to rebut plaintiff's argument that those actions were in reprisal for his earlier charges of gross mismanagement and criminal misconduct.

(4) The trial court properly excluded extrinsic evidence of wrongdoing by two female employees and by the husband of one of them to impeach their credibility. Rule 608(b), Ariz. R. Evid., 17A A.R.S.

(5) We need not reach issues concerning the applicability of the claims statutes or whether employees were acting within the scope of their employment absent and evidence of wrongdoing justifying relief.

Affirmed.

/s/ Joseph M. Livermore, Presiding Judge

Concurring:

/s/ Michael A. Lacagnina, Judge

/s/ Lloyd Fernandez, Judge

APPENDIX B.

Arizona Revised Statutes

38-531. Definitions

In this article, unless the context otherwise requires:

1. "Employee" means an officer or employee of this state or any of its departments, commissions, agencies or boards. Employee includes employees and officers of community college districts, school districts and counties of this state but does not include offers or employees of a municipal corporation established for the purpose of reclamation and distribution of water and the generation of electricity.

2. "Former employee" means an employee who was dismissed.

3. "Personnel action" means:

(a) Appointment.
(b) Promotion.
(c) Disciplinary or corrective action.
(d) Detail, transfer, or reassignment.
(e) Suspension, demotion, or dismissal.
(f) Reinstatement.
(g) Restoration.
(h) Reemployment.
(i) Decision concerning pay, benefits or awards.
(k) Elimination of the employee's position without a reduction in force by reason of lack of monies or work.
(l) Other significant changes in duties or responsibilities which is inconsistent with the employee's salary or grade level.

4. "Public body" means the attorney general, the legislature, the governor, a federal, state, or local law enforcement agency, the county attorney, the governing board of a community college district or school district, the board of supervisors of a county or an agency director.

5. "Reprisal" means to take a personnel action the result of which is adverse to the employee.

38-532. Prohibited personnel practice; violation; reinstatement; exceptions; civil penalty

A. It is a prohibited personnel practice for an employee who has control over personnel actions to take reprisal against an employee for a disclosure of information of a matter of public concern by the employee to a public body which the employee reasonably believes evidences:

1. A violation of any law.

2. Mismanagement, a gross waste of monies or an abuse of authority.

B. The disclosure by an employee to a public body alleging a violation of law, mismanagement, gross waste of monies or abuse of authority shall be in writing and shall contain the following information:

1. The date of the disclosure.

2. The name of the employee making the disclosure.

3. The nature of the alleged violation of law, mismanagement, gross waste of monies or abuse of authority.

4. If possible, the date or range of dates on which the alleged violation of law, mismanagement, gross waste of monies or abuse of authority occurred.

C. An employee who knowingly commits a prohibited personnel practice shall be ordered by the state personnel board, a community college district governing board, a school district governing board, or other appropriate independent personnel board established or authorized pursuant to ARS 38-534 to pay a civil penalty of up to five thousand dollars to the state general fund, a county general fund, a community college district unrestricted general fund or a school district maintenance and operation fund, whichever is appropriate. The employee who committed the prohibited personnel practice, not the governmental entity, shall pay the civil penalty. Upon a finding that an employee committed a prohibited personnel practice, the employer shall take appropriate disciplinary action including dismissal.

D. An employee or former employee against whom a prohibited personnel practice is committed may recover attorney fees, costs, back pay, general and special damages and full reinstatement for any reprisal resulting from the prohibited personnel practice as determined by the court.

E. An employee does not commit a prohibited personnel practice if he takes reprisal against an employee if that employee discloses information in a manner prohibited by law or the materials or information are prescribed as confidential by law.

F. This section may not be used as a defense in a disciplinary action where the employee is being disciplined for cause pursuant to ARS 41-770, except in a hearing on a complaint brought pursuant to this section by an employee or former employee who believes he has been the subject of a prohibited personnel practice as prescribed in this section as the result of a disclosure of information.

G. On request or at any time an employee alleges reprisal, an employer shall provide an employee who is subject to disciplinary or corrective action, suspension, demotion, or dismissal with a copy of this section.

H. If an employee or former employee believes that a personnel action taken against him is the result of his disclosure of information under this section, he may make a complaint to the appropriate independent personnel board, if one is established or authorized pursuant to ARS 38-534 or to a community college district governing board or school district governing board. If an independent personnel board has not been established or authorized, or if a school district governing board or a community college district governing board does not hear and decide personnel matters brought pursuant to this section, the employee or former employee may make a complaint to the state personnel board. A complaint made pursuant to this section shall be made within ten days of the effective date of the action taken against him. The state personnel board, a school district governing board, a community college district governing board or other appropriate independent personnel board, shall, pursuant to the rules governing appeals under ARS 41-785, make a determination concerning:

1. The validity of the complaint.

2. Whether a prohibited personnel practice was committed against the employee or former employee as a result of disclosure of information by the employee or former employee.

I. If the state personnel board, a community college district governing board, a school district governing board or other appropriate independent personnel board established or authorized pursuant to ARS 38-534 determines that a prohibited personnel practice was committed as a result of disclosure of information by the employee or former employee, it shall rescind the personnel action and order that all lost pay and benefits be returned to the employee or former employee. The employee, former employee, employee alleged to have committed a prohibited personnel practice pursuant to subsection A of this section or employer may appeal the decision of the state personnel board, a community college district governing board, a school district governing board or other appropriate independent personnel board established or authorized pursuant to ARS 38-534 to the superior court as provided in title 12, chapter 7, article 6. Notwithstanding ARS 12-910, an appeal to the superior court under this section shall be tried de novo.

J. For purposes of a hearing by the state personnel board, a school district governing board, a community college district governing board or other appropriate independent personnel board conducted under this section, the employee, former employee, employee alleged to have committed the prohibited personnel practice pursuant to subsection A of this section and employer may be represented by counsel. In addition, representation by counsel in such hearings shall meet any other requirements stipulated by the state personnel board, a school district governing board, a community college district governing board

or other appropriate independent personnel board or as required by law.

K. An employee or former employee may also seek injunctive relief as is otherwise available in civil actions.

L. This section shall not be construed to limit or extend the civil or criminal liability of an employee or former employee for any disclosure of information or to limit an employee's right to a separate pretermination hearing with the employee's employer, as provided by law.

M. An employee who knowingly makes a false accusation that a public officer or employee who had control over personnel actions has engaged in a violation of any law, mismanagement, a gross waste of monies or an abuse of authority is personally subject to a civil penalty of up to twenty thousand dollars and dismissal from employment by the employer.

41-770. Causes for dismissal or discipline

A. Each of the following constitutes cause for discipline or dismissal of an employee in the state service:

1. Fraud in securing appointment.
2. Incompetency.
3. Inefficiency.
4. Improper attitude.
5. Neglect of Duty.
6. Insubordination.
7. Dishonesty.
8. Drunkenness on duty.
9. Addiction to the use of narcotics or habit-forming drugs.

10. Absence without leave.
11. Final conviction of a felony or a misdemeanor involving moral turpitude.
12. Discourteous treatment of the public.
13. Improper political activity.
14. Willful disobedience.
15. Misuse or unauthorized use of state property.

B. In addition to the causes prescribed by the terms of subsection A, the director may establish such other causes deemed necessary.

41-782. Duties of the personnel board

A. The personnel board shall hear and review appeals as provided in this article relating to dismissal from state service, suspension for more than forty working hours or demotion resulting from disciplinary action as defined in the personnel rules.

B. The personnel board shall hear and review appeals as provided in title 38, chapter 3, article 9 [section 38-531 *et seq.*], relating to any personnel action taken against an employee or former employee of this state, except an employee or former employee of a state university or the board of regents, which the employee or former employee believes was taken in reprisal for his disclosure of information to a public body. The state personnel board shall recommend the dismissal of a supervisor or other responsible person, other than an elected official, who it determines committed a prohibited personnel practice.

41-785. Appeals to the personnel board; notice of charges; hearings

A. Any employee who has completed his original probationary period of service as provided by the personnel rules may appeal to the board seeking relief from dismissal from state service, suspension for more than forty working hours or demotion resulting from disciplinary action. The appeal shall be filed not later than then working days after the effective date of such action. The employee shall be furnished with specified charges in writing when the action is taken. Such appeal shall be in writing and must state specific facts relating directly to the charges on which the appeal is based and shall be heard by the board within thirty days after its receipt. The personnel board shall provide the employing agency with a copy of the appeal not less than twenty days in advance of the hearing.

B. Hearings on such appeals shall be open to the public, except in cases where the employee requests a confidential hearing, and shall be informal with technical rules of evidence not applying to the proceedings except the rule of privilege recognized by law. Both the employee and his employing agency shall be notified not less than twenty days in advance of the hearing and may select representatives of their choosing, present and cross-examine witnesses, and give evidence before the personnel board. The personnel board may appoint a hearing officer to conduct the hearing and take evidence on behalf of the board and exercise the rights prescribed by ARS 12-2212. The personnel board shall prepare an official record of the hearing, including all testimony recorded manually or by mechanical device, and exhibits, and shall transcribe such record on request of either party. If the disciplinary hearing would involve evidence the state is prevented by law from disclosing,

then a confidential hearing upon the state's request shall be granted.

C. Within thirty days after the conclusion of the hearing, the board shall enter its decision and shall at the same time send a copy of the decision by registered mail to the employing agency and to the employee at his address as given at the hearing or to a representative designated by him to receive the same.

D. Any party may appeal the decision of the board pursuant to chapter 7, article 6 [section 12-901 *et seq.*] to the superior court in the employee's county of residence on one or more of the following grounds, that the order was:

1. Founded on or contained error of law which shall specifically include error of construction or application of any pertinent rules.
2. Unsupported by any evidence as disclosed by the entire record.
3. Materially affected by unlawful procedure.
4. Based on violation of any constitutional provision.
5. Arbitrary or capricious.

E. Appeal shall be available to the court of appeals from the order of the superior court pursuant to title 12, chapter 7, article 6 as in other civil cases.

F. An employee may represent himself or designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing held pursuant to this section providing that no fee may be charged for any services rendered in connection with such hearing by such designated representative who is not an attorney admitted to practice.

APPENDIX C.

Arizona Administrative Code

R2-5-803. Dismissal

A. Pre-Dismissal Procedures: Before an employee with permanent status can be dismissed, the agency head shall give the employee written notice of the charges, a summary of the agency head's basis for the charges, and an opportunity for the employee to present a written response. The employee's response shall be made not later than three working days after the employee receives notice of the charges, unless extended in writing by the agency head.

B. Dismissal Procedures: The agency head may dismiss any employee with permanent status only for cause, but not before attempting to serve the employee personally or by registered or certified mail, return receipt requested (addressee only), with written notice of the specific reasons for dismissal in sufficient detail to inform the employee of the facts, with a copy to the Director. The agency head shall include a statement of the employee's right to appeal. The action is not effective until one of the following occurs:

1. The employee signs for receipt of the dismissal letter personally served or served by mail; or

2. Three working days have passed since the letter was mailed to the employee; or

3. An attempt is made to personally serve the dismissal letter, but the employee

refuses to sign for the letter. Such an attempt to personally serve the letter shall be witnessed.

If an employee is on an approved period of leave with pay, the action will be effective at the end of the approved period of leave with pay, and the dismissal letter shall be served on the employee in accordance with this subsection.

C. Dismissal During Probation:

1. An employee on original probation may be dismissed without the right of appeal.

2. An employee on promotional probation may not be dismissed without the right of appeal.

D. Relief from Duty: Nothing in this Rule shall preclude the agency head from immediately placing an employee on administrative leave pending implementation of procedures under this section, but no pay shall be withheld for such period.

R2-5-901. Resignation

A. General: An employee may terminate employment with the State Service by submitting a written resignation to the agency head at least ten working days prior to the effective date of the resignation. Unless the Director determines that the employee had good cause for not giving such notice, an employee who fails to give such notice shall not be eligible for reinstatement.

B. Oral Resignation: If an employee resigns orally, the agency head shall confirm the resignation in writing.

C. Refusal of Resignation: An agency head may refuse to accept a resignation and dismiss an employee pursuant to R2-5-803.

D. Withdrawal of Resignation: A resignation may be withdrawn only in writing by personal delivery to the agency head not later than the end of the next working day after the employee gives notice of resignation. If a withdrawal is not submitted by this time, the resignation shall be final unless both the agency head and the employee agree that the resignation may be withdrawn.

R6-3-51135.

B. Discharge before effective date of resignation

1. When a claimant submits his resignation and is discharged by the employer before the effective date of the resignation, his separation shall be adjudicated in accordance with the applicable section of these rules, as well as the following:

2. If the discharge is because of the resignation and is 15 days or more before the effective date of the resignation the separation shall be a discharge for reasons other than work-connected misconduct.

3. If the discharge is because of the resignation and is less than 15 days before the effective date of the resignation the separation is a

quitting of work to be adjudicated on the merits of the reason for the resignation.

4. If the discharge is not because of the resignation, the separation shall be adjudicated on the basis of the reasons for the discharge. Leaving work before the effective date of the resignation submitted to avoid a discharge for misconduct shall be considered a discharge for work-connected misconduct, and a separation because of a resignation which leaves it up to the employer to determine the effective date shall be a quitting or work and will be adjudicated on the merits of the reason for the resignation.